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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 725

SIDNEY SCHWARTZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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IN THE

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No.

SIDNEY SCHWARTZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Petitioner Sidney Schwartz prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on July 1, 1965.

Jurisdiction

The judgment of the Appellate Division, First Department, New York State Supreme Court, was entered on July 1, 1965 unanimously affirming without opinion, petitioner's conviction on January 4, 1965. Leave to appeal to the New York State Court of Appeals was denied on August 6, 1965 and reargument of the decision of the New York State

Court of Appeals refusing to grant leave to appeal was denied on August 18, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

Questions Presented

1. Where petitioner had given law enforcement agents authority to inspect, in his office, his personal books and records, and books and records of a partnership in which he was a general partner, was it a violation of his Constitutional right to be free from unreasonable seizures and his Constitutional right to refuse to incriminate himself, for the State, without authorization, to seize those records and use them as evidence in the trial below against petitioner?

2. Where petitioner was being investigated by the State of New York, and where his counsel had agreed with the State to make books and records available in petitioner's office, and where three State agents seized those books and records, was there a knowing and intentional consent by petitioner to waive his Constitutional right to be free from unreasonable seizures and his Constitutional right to refuse to incriminate himself?

Constitutional Provisions Involved

The Fourth, Fifth and the applicable portion of the Fourteenth amendment to the Constitution are printed in Appendix B, *infra*, page 23.

Statement

Petitioner Sidney Schwartz was tried and on January 4, 1965 was convicted in the Supreme Court of the State of New York, New York County of the following crimes:

causing a false statement as to securities to be made in an offering prospectus in violation of § 952 of the New York Penal Law (Count 1); obtaining a signature to a written instrument by use of a false statement or writing in violation of § 932 of the New York Penal Law (Counts 3, 4 and 5); engaging in a fraudulent device or scheme to obtain money in violation of § 352(c) of the New York General Business Law (Count 7); and commiting a fraud in the affairs of a limited partnership in violation of § 920 of the New York Penal Law (Count 8). Petitioner was sentenced to one year on Counts 1, 3, 4 and 5; 6 months on Count 7; and 6 months on Count 8, all sentences to run concurrently. Count 2 was dismissed by the Court and Count 6 was withdrawn by the People (R. 1175). Those counts charged that petitioner obtained the signature of a person to a written instrument with intent to defraud in violation of § 932 of the New York Penal Law.

According to the evidence in the Court below, petitioner was a general partner and in control of Beaux Arts Associates, a limited partnership organized by him in November 1960 for the purpose of obtaining a long term ground lease to Beaux Arts Apartments, located in Miami Beach, Florida (People's Ex. 1). In order to raise funds for acquisition of the lease, a prospectus dated February 23, 1961 was issued, which stated that an offering was being made consisting of $790,000 in additional limited partnership units of Beaux Arts Associates, and that the capital structure would consist of $85,000 in subordinated limited partnership units and $790,000 in additional limited partnership units (*Ibid.*).

The indictment charges that the statements in the prospectus that the offering consisted of $790,000 in limited partnership units and $85,000 in subordinated limited partnership units were false. This alleged false statement is the foundation for the proof of each count in the indictment.

In order to prove that the statements were false, the State relied on the following personal books and records of the petitioner which, as we shall show below, were illegally seized from petitioner, were prejudicial to petitioner, and were introduced in evidence over timely objection of petitioner:

a. Petitioner's cash receipts and cash disbursements book reflecting deposits and withdrawals in an account called "Sidney Schwartz Special Royal State Bank" (People's Ex. 51, R. 454-56, 856).

b. Petitioner's cash receipts and cash disbursements book reflecting deposits and withdrawals in an account called "Sidney Schwartz Regular Trade Bank" (People's Ex. 52, R. 456-58, 856).

We believe that it will be undisputed that the above personal books and records which were seized from petitioner were prejudicial to him at the trial. We also believe that it will be undisputed that if the above books and records were illegally seized then the judgment of conviction must be reversed.

The personal books and records, according to the State's theory of the case, aided the State in proving the alleged falsity of statements in the prospectus that the Beaux Arts Associates offering consisted of $790,000 in additional limited partnership units and that the capital structure of the partnership consisted of $85,000 in subordinated limited partnership units and $790,000 in additional limited partnership units. The State used the personal books and records in an effort to show that over-sales of partnership units were made by petitioner, proceeds of which went into his own personal account, which when considered with the partnership books and records, show sales of partnership units higher than stated in the prospectus. (See R. 541, 612-15, 633-34, 658, 856, 860-61, 896-97.)

The State also contended that the personal books and records showed concealment and co-mingling of funds be-

tween petitioner personally and the partnership, indicating an intent by petitioner to use partnership funds as his own and showing that rebates of partnership funds were deposited in petitioner's personal accounts. (See R. 470-72, 589, 856-57.) Thus, the personal books and records were prejudicial to petitioner with respect to each count of the indictment of which he was convicted.

In order to prove its case against petitioner, a general partner of Beaux Arts Associates, the State also relied upon the following Beaux Arts Associates books and records which also were illegally seized with petitioner's personal books and records:

a. Cash receipts and disbursements book known as "Sidney Schwartz Beaux Arts"; checkbook and cancelled checks on account entitled "Sidney Schwartz Special Beaux Arts", maintained at the Trade Bank and Trust Company[1] (Exs. 43, 44, 45, 45A and 45B, R. 864-65).

b. Cancelled checks of Beaux Arts Associates, drawn on the Royal State Bank of New York (People's Ex. 47, R. 448).

c. Second Beaux Arts cash disbursement book for 1961 (People's Ex. 48, R. 450).

d. Second cash disbursement book for 1962 for Beaux Arts Associates (People's Ex. 49, R. 452).

e. Records reflecting 1961 distributions to the limited partners of Beaux Arts Associates (Ex. 53, R. 458).

f. Beaux Arts ledger sheets of investors for the year 1962 reflecting distributions to investors in that year (Ex. 54, R. 461).

g. Record of investors in Beaux Arts Associates (People's Ex. 55, R. 464).

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[1] There is evidence in the record that these were petitioner's personal documents (R. 864-65).

h. Partnership agreement of Beaux Arts Associates (People's Ex. 56, R. 466).

i. General Ledger of Beaux Arts Associates for the year 1961 (People's Ex. 57, R. 467).

j. Second General Ledger of Beaux Arts Associates for the year 1961 (People's Ex. 58, R. 469).

We believe that it will be undisputed that if the partnership records, which were prejudicial to defendant, were improperly received in evidence, the conviction must be reversed.

The record below shows that the above personal and partnership books and records were illegally seized from petitioner by agents of the State of New York in violation of the Fourth and Fifth Amendment rights of petitioner as guaranteed to him by the Fourteenth Amendment and that it was improper for the Court below to deny petitioner's motion to suppress this evidence, which was timely made and renewed at the trial. (See papers in support and in opposition to petitioner's motion of February 18, 1964 to suppress, and decision of Mr. Justice Sarafite dated February 27, 1964, App. A, *infra*, p. 20. See also R. 443-44. There was incorporated by reference, in the aforesaid motion the papers in support of and in opposition to petitioner's motion for an inspection of grand jury minutes and a dismissal of the indictment. That motion was denied by Mr. Justice Gellinoff on October 21, 1963, App. A, *infra*, p. 22.)

The above records were seized in petitioner's office by three agents of the Attorney General of the State of New York on October 2, 1962 (See papers in support of and in opposition to motion to suppress. See also R. 507-509). The record below shows that at the time of the seizure the agents were acting on authority of a letter dated September 13, 1962, from the defendant's then attorney, Sidney

M. Wittner, Esq., to the "Office of the Attorney General." The letter states the following in its entirety:

> "This is to advise you that pursuant to your request Mr. Sidney Schwartz's office has been authorized to make all books and records available for your examination at Mr. Schwartz's office."[2]

Mr. Saul S. Cohen, the Assistant Attorney General in charge of the investigation leading to petitioner's indictment, in an affidavit dated August 8, 1963 in opposition to petitioner's motions to dismiss and motion for inspection of grand jury minutes (later incorporated in Mr. Cohen's affidavit dated February 1964 in opposition to defendant's motion to suppress) admits that the agents who went to petitioner's office were acting under the Wittner letter of authorization. Thus, Mr. Cohen alleged that "on September 14, after he received from Mr. Wittner" the letter of authorization to go to Schwartz' office, he directed Mr. Albert Gombar, a "senior securities accountant for the department of law" to "take the authorization" and go to Schwartz' office to make an inventory (Cohen affidavit, p. 7).

Mr. Gombar went to petitioner's office, and apparently because the books and records were too voluminous to be inspected by one man alone, Mr. Gombar returned and stated that he felt additional people should be assigned to aid him (Cohen affidavit, p. 7). Obviously, Mr. Gombar did not believe that additional people should be assigned to him to seize the records from petitioner, but rather to inspect those records at petitioner's office. Additional

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[2] Ex. 16 annexed to Aff. of Ass't. Attorney General Cohen dated August 8, 1963 submitted in opposition to petitioner's motion to inspect grand jury minutes and to dismiss the indictment. This affidavit was incorporated by reference in the affidavit of Mr. Cohen dated February, 1964 in opposition to petitioner's motion to suppress evidence.

people were assigned to Mr. Gombar and on October 2, 1962, still operating under the authority of the Wittner letter and the Wittner letter alone, Mr. Gombar and two other state agents (Frederick D. Hatem and Robert Cantor) went to petitioner's office for the purpose of inspecting the records. However, the agents made no inspection of the records in petitioner's office. Indeed, the records were too voluminous to have been intelligently inspected on the day they were seized. Instead, the agents merely made an inventory of the records (See Aff. of Agent Gombar dated August 8, 1963) and, although they had no authority to do so, they seized the records listed above and took the records to the Attorney General's office for subsequent use in the criminal case against petitioner.

Two days after the illegal seizure, the Attorney General wanted to return to petitioner's office to inspect books and records which they had not seized (Cohen aff. dated August 8, 1963, p. 9). Mr. Wittner, knowing that the State agents had exceeded their authority and had illegally seized petitioner's records, repeated the limited authorization in the following handwritten endorsement placed on the original letter of authorization dated September 13, 1962 to the Attorney General, authorizing inspection to be made at petitioner's office:

> "The above includes the right to examine the books at the Beverly Hotel, but same may not be removed from the hotel." (Ex. 38 to Cohen aff. dated August 8, 1963.)

Thus, it is clear that State agents violated the agreement that the Attorney General had made with petitioner's counsel, exceeded the limits of their authority, illegally seized the petitioner's books and records and based their prosecution upon those records.

On February 18, 1964 petitioner moved to suppress that evidence.

The Court below denied petitioner's motion on the erroneous ground that "all of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General" (Decision of Sarafite, J., dated February 27, 1964 App. A, *infra*, p. 20). The Court's finding was clearly without support in the record and the Attorney General has repeatedly admitted that there was no subpoena outstanding at the time that the records were seized. At the trial itself, referring to these documents, the Attorney General, when asked by the Court whether or not a subpoena was outstanding at the time the agents seized these books said, "there was no subpoena outstanding at that time." (R. 507)

That there was no subpoena outstanding at the time that the seizure of records was made is clear from the affidavit of Mr. Cohen, dated August 8, 1963. Mr. Cohen states, with respect to the books and records seized on October 2, 1963, that at no time did the agents deliver to Mr. Schwartz any subpoena calling for the production of the records they took on that day (Cohen aff., p. 8). Mr Cohen also states that no subpoenas were served on Schwartz on that day or any subsequent day for the documents which were seized on October 2, 1963 (Cohen aff., p. 11).

Before trial, the Attorney General attempted to support this seizure by alleging that petitioner had consented to the seizure (See Cohen aff., pp. 7-9).[3] Significantly, the Court below did not find consent and did not attempt to support the seizure on the ground of consent. Moreover, as we shall show below, the State has not met its burden of proving by clear and convincing evidence that petitioner knowingly waived his Constitutional rights to be free from

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[3] At the trial, the Attorney General erroneously contended that all of the books and records seized were partnership books and records (R 20) and the Court below appeared to have erroneously relied on the fact that they were all partnership records in admitting them in evidence (R 20, 443).

illegal seizures, and not to incriminate himself. It is clear on this record that there was an illegal seizure, that the records which were illegally seized were prejudicial to the defendant and that the judgment of conviction should be reversed.

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner's personal books and records and the books and records of a partnership of which petitioner was a general partner were illegally seized and introduced in evidence in violation of petitioner's Fourth and Fifth Amendment rights as guaranteed to petitioner by the Fourteenth Amendment.[4]

The decision in the Court below is believed to be erroneous and conflicts with applicable decisions of this Court, which has long recognized that the Fourth Amendment prohibits both illegal searches and illegal seizures. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Boyd* v. *United States,* 116 U. S. 616 (1885). The question presented in this case is of importance in the administration of criminal justice, for if approval is given to the conduct of the State agents here, then one might come to the erroneous conclusion that consent to an inspection or search is tantamount to consent to a seizure. We do not believe this to be the law.

There can be no question about the fact that there was an illegal seizure of petitioner's personal books and records, and of books and records of a partnership of which petitioner was a general partner. Agents of the Attorney

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[4] It is now well settled that the fundamental protections of the Fourth and Fifth Amendments are guaranteed by the Fourteenth Amendment against invasion by the States. *Stanford* v. *Texas,* 379 U. S. 476 (1965); *Malloy* v. *Hogan,* 378 U. S. 1 (1964).

General's office of the State of New York, acting under specific authority to inspect or search but not seize violated that authority and seized instead of inspected. It is important to emphasize that before the agents made the seizure they did not inspect the records, and therefore had no knowledge as to what the records contained. Indeed, it is obvious from the voluminous nature and character of the records seized that a meaningful analysis could not have been made by the agents in the short time that they were on petitioner's premises. Thus, before the seizure and subsequent audit made in the Attorney General's office the agents could not have given any testimony about what was in the records.

In *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds 330 U. S. 800 (1947), agents had authority to inspect books and records on the premises of the defendant. They inspected the records on those premises and found a cancelled check which they then knew from mere inspection was evidence that a crime had been committed. The agents requested the check. It was given to them by petitioner's bookkeeper and was introduced into evidence at the trial. This Court, with three judges dissenting in a 5 to 3 opinion (Mr. Justice Jackson took no part in the decision), said that assuming that the taking of the check was unlawful, the knowledge which the agents had about the check was legally obtained and, therefore, there was no wrongdoing in the method by which the incriminating evidence was obtained.

However, the majority specifically said that "consent to the inspection did not include consent to the taking of the check." 328 U. S. at 630. Mr. Justice Frankfurter, in a dissenting opinion joined in by Mr. Justice Murphy and Mr. Justice Rutledge, said that the seizure was illegal and that the check should have been suppressed. Mr. Justice Frankfurter agreed that the government had authority to inspect petitioner's books and records and that the inspec-

tors could testify as to what they had gleaned from the inspection. Mr. Justice Frankfurter, however, went on to say:

> "But as is pointed out in my dissent in *Davis* v. *United States,* decided this day, *ante,* p. 594, the constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. And that is the issue here. The legality of a search does not automatically legalize every accompanying seizure."

In the instant case the reasoning of the majority of the Court in *Zap* would not apply because the agents made no inspection before they seized the records and, therefore, before the illegal seizure had no knowledge as to what the books and records contained. Thus, the agents could not have testified about the contents of those books and records.

It should be noted that in *Zap* the Government argued that the seizure was proper because the check itself had been the instrumentality of a crime, was found in the course of a lawful search and therefore was admissible (Government's Br. *Zap* v. *United States*). No such argument may be made in this case because the documents seized could, in no sense, be regarded as instrumentalities of a crime. In addition, even if the documents seized had been instrumentalities of a crime, they could not have been lawfully seized as such by the agents who had no knowledge of their contents.

It has long been recognized that the Fourth Amendment prohibits both (a) illegal searches and (b) illegal seizures. As was stated in the widely quoted concurring opinion by Justice Miller in *Boyd* v. *United States,* 116 U. S. 616, 641 (1885), "the things herein forbidden are two: search and seizure." This Court has long held that a lawful search does not necessarily justify a seizure and that it is improper to introduce in evidence documents found pursuant to a lawful inspection but which are illegally seized. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Kremen* v. *United States,* 353 U. S. 346 (1957).

In *Gouled* v. *United States,* 255 U. S. 298 (1921), no objection was made to the sufficiency of either the search warrant which authorized the inspection or the affidavit in support of it. Thus the search was lawful. Nevertheless, this Court held that it was improper to introduce in evidence documents which were found and seized. In that case, acting under a search warrant, government agents seized certain papers including an unexecuted form of contract between the defendant and another, a written contract signed by defendant and another, and a bill for disbursements and professional services rendered by an attorney to the defendant. Since the validity of the warrant was not tested, it follows that the officers had a right to be on the premises where they were and to see the documents which were seized. Nevertheless, this Court held that petitioner's Fourth and Fifth Amendment rights had been violated and that it was improper for the seized documents to be received in evidence because they were merely evidentiary and not the instrumentalities of a crime.

In *Abel* v. *United States,* 362 U. S. 217, 234 (1960), this Court, asking whether or not certain articles were properly seized during a lawful search, said:

> "We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled* v. *United States,* 255 U. S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen* v. *United States,* 353 U. S. 346."

This Court has always scrutinized and limited the power of government agents to seize property. Officers may seize only instruments of a crime, things which may aid in escape, contraband and fruits of the crime for which the

search is made. *Harris* v. *United States,* 331 U. S. 145 (1947). The documents which were seized here fall in none of those categories, and there was no justification for their seizure.

The Fourth Amendment prohibits "unreasonable" seizures and the test of whether or not a seizure is "unreasonable" is not rigid or absolute. Each case is to be decided on its own facts and circumstances. *Harris* v. *United States, supra; Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931). Under the facts and circumstances of this case, there was no justification for the seizure which therefore must be characterized as unreasonable.

The State had no right to possession of these documents. If it desired possession it should have proceeded in a lawful manner or not at all. *Gouled* v. *United States, supra.* Since the records were not instrumentalities of a crime, nor the fruits of a crime, no valid search warrant could have been issued for them. *Harris* v. *United States, supra.* However, if the State desired possession it could have attempted to negotiate with counsel for petitioner for possession instead of the more limited right to inspect. If petitioner refused to voluntarily surrender possession the State could have issued a subpoena and a Fifth Amendment claim of privilege may have been made. Indeed, it was probably to avoid a claim of privilege that the State was willing to agree to examine the records in petitioner's office. Certainly, the Attorney General knew, and as the Attorney General argued below, defendant Schwartz was told that he could claim privilege against self-incrimination and refuse to produce his personal records (See Cohen aff. dated August 23, 1963, p. 2). Apparently, rather than face the possibility that insistence on production of the documents in response to a subpoena would be resisted by a claim of privilege against self-incrimination, the Attorney General agreed to examine petitioner's records in petitioner's office.

It should be noted that a claim of Fifth Amendment privilege may have been made not only with respect to the personal books and records but also with respect to the partnership books and records seized in this case. This Court has never held that the Fifth Amendment privilege does not apply to partnerships, although it has been so held by the Court of Appeals for the Second Circuit in *Silverstein* v. *United States,* 314 F. 2d 789 (2 Cir.), cert. denied 374 U. S. 807 (1963). Even assuming that *Silverstein* correctly states the applicable law, it is by no means clear that the partnership in this case is of such scope as to lead to the conclusion that petitioner held the records in a representative capacity and that *Silverstein* would be applicable. We do not raise that question separately here because:

a) Petitioner's personal books and records were seized and used in evidence to petitioner's extreme prejudice, and this is sufficient for reversal here, and

b) Petitioner being a general partner of Beaux Arts Associates had standing to make the claim that the records of that partnership were illegally seized. See *Jones* v. *United States,* 362 U. S. 257 (1960); *Henzel* v. *United States,* 296 F. 2d 650 (5 Cir. 1961).

The State chose to negotiate with petitioner and obtain a limited right to inspect the petitioner's documents in his office. The State made no inspection. Instead they made a seizure which was unreasonable and therefore illegal. The records which were illegaly seized were introduced in evidence to petitioner's prejudice, after timely efforts by petitioner to enforce his Constitutional rights, and we respectfully urge this Court to grant petitioner's writ of certiorari and ultimately reverse the conviction below.

POINT II

The State has failed to meet its burden of showing that petitioner knowingly and intentionally waived his constitutional rights.

The Attorney General erroneously attempted to support this illegal seizure on the ground that petitioner consented to the seizure. Certainly, consent to seize cannot be inferred from the September 13, 1962 letter of Mr. Wittner to the Attorney General, authorizing an inspection of the books and records in the petitioner's office.

In order to attempt to justify this seizure, the three State agents who seized petitioner's records submitted affidavits in opposition to defendant's August 9, 1963 motion for a dismissal of the indictment and for an inspection of the Grand Jury minutes. The affidavits of agents, Cantor, Gombar and Hatem, dated August 8, 1963, state in substance that on the date of the seizure petitioner, out of the presence of his counsel, consented to have certain of the books and records removed. These allegations were denied in affidavits dated August 14, 1963 of employees of Beaux Arts Associates, Alfred Leal and Laura Satz, both of whom were present in petitioner's office at the time that the seizure was made. Petitioner was not present at the time the actual seizure was made (Leal aff. dated August 14, 1963, p. 2). Mr. Leal alleged, and Mrs. Satz agreed that when the agents informed Mr. Leal that they were taking the books and records with them, Mr. Leal objected and said that he had only been instructed to show the books and records to them. Mr. Leal further alleges that one of the men said that petitioner was already under subpoena to produce the books and records, and, if necessary, another subpoena would be issued.

Even assuming the State's version of these disputed issues of fact, the State has not met its burden of proving

a conscious waiver by petitioner of his constitutional rights. The Attorney General had negotiated with the attorney for petitioner, and had agreed that the books and records would be inspected in petitioner's office. Operating under that agreement, which did not authorize removal or seizure of the records, three agents of the State of New York came to petitioner's office and now allege that, without his attorney being present, petitioner consented to the removal of books and records. Cf. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The agents do not allege that they informed petitioner that he had a right to refuse to permit them to take the records and they have offered no explanation why they even attempted to obtain the consent of petitioner to give up possession of the records out of the presence of his counsel, when a prior different agreement had been made between the Attorney General and counsel for the petitioner.

It is clear that even on its own version of the facts the State has not met its burden of proving a knowing and intentional waiver of petitioner's Fourth and Fifth Amendment rights as guaranteed to him by the Fourteenth Amendment. "'Courts indulge every reasonable presumption against a waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). The waiver of a constitutional right must be with "understanding" and it must be "intentional", *Johnson* v. *United States,* 333 U. S. 10, 13 (1947). To be voluntary, a consent must be " 'unequivocal and specific,' " and " 'freely and intelligently given' ", *Judd* v. *United States,* 190 F. 2d 649, 651 (D. C. Cir. 1951).

In this case, under the State's version of the facts, three agents went to petitioner's office knowing that they had been authorized to inspect but not seize. There, in the absence of his attorney, they extracted from him a so-called "consent." Such a consent is not a conscious waiver

of a constitutional right, particularly when an agreement had been reached between counsel for the State and counsel for the petitioner that the books and records would be inspected only in the office of the petitioner.

Furthermore, under the version of the facts given by Mr. Leal and Mrs. Satz, there was clearly not only a lack of consent, but an objection was made that the authorization of the State was only to inspect not to seize the records (Leal and Satz affidavits dated August 14, 1963). In addition, under the version of the facts given by Mr. Leal and Mrs. Satz, State agents actually coerced and misrepresented the facts by erroneously stating that a subpoena was outstanding and that if the books and records were not released a subpoena would be issued. Taking the State's version, or petitioner's version of the facts, there was no consent in this case, and the records were illegally seized.

Conclusion

This case presents important questions relating to distinctions between searches and seizures, and the right to be free from illegal seizures, as well as illegal searches; those distinctions were ignored below in a way which is not in accord with applicable decisions of the Court. We respectfully request that the petition for Writ of Certiorari be granted.

Respectfully submitted,

November 3, 1965.

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APPENDIX A

Judgment of Appellate Division, First Judicial Department, County of New York.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 1st day of July, 1965.

Present: Hon. Benjamin J. Rabin,
Justice Presiding,

" James B. M. McNally,
" Harold A. Stevens,
" Aron Steuer,
" Ellis J. Staley, Jr.,
Justices.

9065

The People of the State of New York,

Respondent,

vs.

Sidney Schwartz,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on the 4th day of January, 1965, convicting defendant of violating § 952, Penal Law (Count 1), § 932, Penal Law (Counts 3, 4 and

5), § 352(c), General Business Law (Count 7) and § 920, Penal Law (Count 8), and said appeal having been argued by Mr. Avel B. Silverman of counsel for the appellant, and by Mr. Alan L. Kazlow of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

FRANK H. CRABTREE,
Deputy Clerk.

Opinion of Justice Sarafite, dated February 27, 1964.

SUPREME COURT,

NEW YORK COUNTY,

SPECIAL AND TRIAL TERM, PART XXX.

INDICTMENT No. 2531—63

THE PEOPLE OF THE STATE OF NEW YORK

against

SIDNEY SCHWARTZ,

Defendant.

SARAFITE, J.

This is a motion to suppress evidence obtained by the Attorney General.

Defendant has been indicted on five counts of obtaining the signatures of persons to written instruments with the

intent to cheat or defraud, and three counts of related crimes.

All of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General. The defendant, represented by counsel, neither tested the validity of the subpoena by motion to quash nor, after responding to it, did he refuse to answer questions or produce evidence. Neither did he assert any privilege to withhold any answer given or evidence produced (See General Business Law, § 359, and Penal Law, § 2447).

It is difficult to comprehend how it could ever be argued that such evidence was obtained as a result of unlawful search and seizure.

Moreover, the issue raised here was passed upon in another form in a motion by the defendant to inspect the Grand Jury minutes and to dismiss the indictment "upon the ground that the evidence here presented was in violation of the defendant's constitutional rights in that defendant was compelled to testify and furnish evidence against himself" pursuant to subpoena, and that the indictment was allegedly based on insufficient legal evidence.

That motion was denied in all respects by the court, (Gellinoff, J., N.Y.L.J., October 24, 1963, p. 14, c. 5) holding that "defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law."

Defendant, on the same papers, now moves to suppress this same evidence.

The motion is denied.

Submit order.

Dated: February 27, 1964.

JOSEPH A. SARAFITE,
J. S. C.

Appendix A

Opinion of Justice Gellinoff, dated October 21, 1963.

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 30

Index No. 2531/63

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY SCHWARTZ,

Defendant.

GELLINOFF, J.:

Defendant moves for an inspection of the Grand Jury minutes and for a dismissal of the indictment. Insofar as the motion urges that the indictment is based on insufficient legal evidence, it is denied (see People v. Howell, 3 N Y 2d 672). In the respect that the motion is based on the claim that defendant's constitutional rights were violated in that he was compelled to testify and furnish evidence against himself, it is likewise denied. The facts of this case, and the circumstances under which defendant testified before the Attorney General, do not bring him within the *ratio decidendi* of the cases relied on by him (e.g., People ex rel. Kenny v. Adams, 292 N. Y. 65; People v. Steuding, 6 N Y 2d 214; People v. Laino, 10 N Y 2d 161). The defendant did not testify before the Grand Jury, his testimony before the Attorney General was not submitted to the Grand Jury and, to the extent that books and records delivered by him to the Attorney General under compulsion of a subpoena were later used as evidence before the Grand Jury, defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law.

Dated: October 21, 1963

J. S. C.

APPENDIX B

Constitutional Provisions.

Constitution

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment, of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 725

SIDNEY SCHWARTZ,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 725

SIDNEY SCHWARTZ,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

Preliminary Statement

On January 4, 1965 petitioner was convicted in the Supreme Court of the State of New York, New York County (BACKER, J.) on six counts of an indictment[1] charg-

[1] The indictment charged petitioner with causing a false statement as to securities to be made, issued or published in violation of N. Y.

(Footnote continued on following page)

ing him with fraudulently issuing and selling both regular and subordinated limited partnership interests in excess of the stated capital as represented in the prospectus (People's Exhibit 1, R. 31). The judgment was unanimously affirmed by the Appellate Division, First Department, on July 1, 1965. Leave to appeal to the New York Court of Appeals was denied by Judge BURKE of that Court on August 6, 1965, and reargument was denied on August 18, 1965.

Petitioner now seeks review of the Appellate Division's judgment of affirmance, claiming that illegally seized evidence was used against him at trial in derogation of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution.

Opinions Below

The judgment of the Appellate Division, affirming the conviction without opinion, is reported at 24 App. Div. 2d 704. No opinion was written by Judge BURKE when he denied leave to appeal to the New York Court of Appeals.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3).

(Footnote continued from preceding page)

Penal Law § 952 (Count 1); obtaining a signature to a written instrument by use of a false statement or writing in violation of § 932 of the Penal Law (Counts 2, 3, 4, 5 and 6); engaging in a fraudulent device or scheme to obtain money in violation of General Business Law § 352 (c) (Count 7); and committing a fraud in the affairs of a limited partnership in violation of § 920 of the Penal Law (Count 8). Petitioner was convicted on counts 1, 3, 4, 5, 7 and 8. He was sentenced to one year on counts 1, 3, 4 and 5; six months on count 7; and six months on count 8, all sentences to run concurrently.

Statutes and Constitutional Provisions Involved

The pertinent provisions of Article 23-A of the General Business Law, empowering the Attorney General to regulate the issuance and sale of securities including specific authority to examine witnesses under oath, compel production of books, documents and records, and also requiring registrants to file annual reports with the State Department of Law, are set forth in Appendix A, *infra*, p. 15.

Questions Presented

Whether petitioner's rights to be free from unreasonable searches and seizures were violated where:

1. Petitioner, as a general partner of a state regulated real estate firm, was served with an administrative subpoena *duces tecum* requiring the production of partnership records to which he responded by delivering some records and allowing representatives of the Attorney General to remove others from his office.

2. Petitioner concedes he consented to the search and examination of these records at his office but—for the first time—now denies he agreed to their removal, even though he cooperated fully with the inquiry both before and after the removal and never asked for their return prior to his indictment in July of the following year.

3. The records removed were held by petitioner in a representative capacity and were required by law to be kept for examination.

Statement

Petitioner was a general partner and in control of Beaux Arts Associates, a limited partnership organized by him in November of 1960 for the purpose of obtaining a long term ground lease to Beaux Arts Apartments, located in

Miami Beach, Florida (See prospectus, People's Ex. 1, R. 31). In order to raise the funds for acquisition of the property Schwartz caused a prospectus (Ibid.) dated February 23, 1961, to be issued. The prospectus, offering to the public some $790,000 in additional limited partnership interests, was filed with the Department of Law in accordance with § 352-e(1) of the General Business Law of the State of New York. Petitioner also filed a Registration Statement with the Securities and Exchange Commission under the Securities Act of 1933 (Ibid.).

Acting pursuant to his statutory mandate to protect the public against fraudulent practices in the sale of securities (See App. A, § 352 (1)) the Attorney General, in April of 1962, commenced an investigation into the activities of the petitioner in the real estate securities field. The full chronology of the investigation is set forth in an affidavit dated August 8, 1963 of Saul S. Cohen, Esq., the Assistant Attorney General in charge of the inquiry, submitted in opposition to petitioner's pre-trial motions for inspection of the grand jury minutes and dismissal of the indictment and for suppression of certain evidence.[2] The factual allegations of this affidavit have never been disputed by petitioner, except as herein indicated.

According to the Cohen affidavit, Schwartz appeared at the Attorney General's office with counsel on May 21, 1962, and was served with a subpoena *duces tecum* calling for the production of: "all books, papers, records and other documents in relation Beaux Arts Assoc." [sic].[3] He was at that time informed that he might be excused from answering any question put to him or from producing any

[2] See papers in support and in opposition to petitioner's motion of August 9, 1963 to inspect the Grand Jury minutes and to dismiss the indictment, and decision of Mr. Justice Gellinoff dated October 21, 1963 denying said motion. Appendix B, *infra*, p. 20. See also decision of Mr. Justice Sarafite dated February 27, 1964 denying petitioner's motion to suppress brought on same papers as the previous motion to inspect. Appendix C, *infra*, p. 21.

[3] Exh. 7 annexed to Mr. Cohen's affidavit dated August 8, 1963.

books, papers or other documents on the ground or for the reason that his answer or the documentary evidence requested might tend to incriminate him. Petitioner expressed his understanding of this admonition and further stated his willingness to cooperate fully and submit all materials which the Attorney General deemed useful in the investigation (*Id.* pp. 2 and 4).

It was agreed that petitioner would not have to bring any of these documents to the Attorney General's office, but could send them down by messenger (*Id.* p. 3). On June 12, 1962, some of the requested documents—specifically, the cash books, bank ledger and bank reconcilations of Beaux Arts Associates—were transmitted to Assistant Attorney General Cohen (*Id.*, Exh. 8).

Throughout the course of the investigation, petitioner submitted various other books and records relating to a number of his transactions in the real estate field including documents relating to Beaux Arts Associates (*Id.*, Exh. 11). In regard to some of the books and records subpoenaed by the Attorney General, Schwartz appeared at the Department of Law office on September 11, 1962, with his attorney, and claimed he was unable to produce them because a robbery had taken place in his office and his controller and head bookkeeper had resigned (*Id.*, p. 6). He stated, however, that the books were only misplaced, and agreed to allow members of the Attorney General's staff to examine all books and records at his office and remove those records which they deemed pertinent to the inquiry (*Id.*, p. 6).

After receiving a letter of authorization dated September 13, 1962[4] prepared by Schwartz' attorney, Mr. Gombar, an

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[4] *Id.*, Exhibit 16. The letter reads: "This is to advise you that pursuant to your request Mr. Sidney Schwartz' office has been authorized to make all books and records available for your examination at Mr. Schwartz' office."

accountant from the Attorney General's office, visited petitioner's office and made a preliminary examination.

On September 24, 1962 petitioner again appeared at the Attorney General's office, accompanied by counsel, and consented to a second visit by additional members of the Department of Law arranged for October 2, 1962. Three representatives of the Attorney General met Schwartz at his office on that date, and petitioner repeated that all books and records were available for examination and that those deemed relevant to the investigation could be taken.[5] The books and records were removed on authority of the outstanding subpoena and with petitioner's consent.

On the following day, October 3, 1962, petitioner appeared at the Attorney General's office. He made no complaint about the manner of the examination of his premises or of the books taken. Significantly, petitioner never denied in the courts below that he explicitly consented to the removal of these records on September 11, 1962. To the contrary, petitioner argued that the records were removed in compliance with a subpoena which had previously been served upon him.[6] His sole contention was that the records taken and the testimony given by him at the administrative hearings held by Mr. Cohen were all accomplished "under compulsion of subpoena,"[7] and that this somehow violated his constitutional rights.

At no time prior to his arrest did Schwartz or his attorney demand the return of any of the books and records

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[5] See affidavits of Mr. Gombar, Mr. Hatem and Mr. Cantor, submitted in opposition to petitioner's motion to inspect the Grand Jury minutes and to dismiss the indictment and incorporated by reference in opposition to the motion to suppress.

[6] See affidavits of Sidney Schwartz, dated July 30, 1963 and August 14, 1963 submitted in support of the motion to inspect the Grand Jury minutes and incorporated by reference in the motion to suppress evidence.

[7] *Id.*, affidavit dated July 30, 1963, pp. 2 and 4.

in issue. Instead, he cooperated fully, furnished the state with additional documents regarding Beaux Arts property as late as February 13, 1963,[8] and readily consented (with the advice of counsel) to subsequent visits at his office by members of the Attorney General's staff.[9]

ARGUMENT

Petitioner's claim that illegally seized evidence was used against him at trial is devoid of merit.

A. The books and records which were used at petitioner's trial were the subject of a subpoena which had not been satisfied at the time they were taken from petitioner's office on October 2, 1962.

The decision of Mr. Justice Sarafite (Appendix C, *infra*, p. 21), asserted to be erroneous in the petition (Pet. 9), is based on the finding that the books and records were obtained according to lawful process of subpoena which petitioner neither sought to quash nor refused to respond.

Petitioner argues in a vacuum, wholly ignoring the existence of the subpoena of May 21, 1962 which directed him to produce "all books, records, papers and other documents in relation Beaux Arts Assoc." This subpoena was only partially satisfied by the production on June 12, 1962 of the cash book, general ledger and bank reconciliation of Beaux Arts Associates, and by the production on August 9, 1962 of a list of subordinated units on the Beaux Arts property. As clearly documented in the affidavit of Assistant Attorney General Cohen and confirmed in Schwartz' affidavits of July 30, 1963 and August 14, 1963 (submitted in support of the motion to suppress), the October 2nd visit was made with the latter's consent in an effort to satisfy outstanding subpoenas.

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[8] *Id.*, p. 10.

[9] *Id.*, p. 9.

Petitioner admitted this when he stated in his affidavit of July 30, 1963 (p. 4):

> "Under the compulsion of subpoena I have been compelled to testify against myself and have been compelled to produce my books and records."

The record is replete with similar admissions (see papers in support of this motion and R. 443). These statements offer compelling proof that all the books and records were obtained pursuant to subpoena. The decision in the court below denying the motion to suppress, is thus amply supported by the record. Petitioner, having failed to persuade the state courts that the subpoena power was improperly used, has now completely shifted his position to claim there was no subpoena.

The suggestion in the petition (Pet. 11) that no subpoena was outstanding is based on excerpts taken out of context from statements made by the trial prosecutor[10] and wholly ignores statements of Schwartz, admitting that he produced the records pursuant to subpoena, as well as the obvious fact that the subpoena of May 21, 1962 was never satisfied. The inescapable fact is that a subpoena requiring the production of these books and records was unsatisfied and outstanding at the time they were obtained.

B. Even assuming, *arguendo*, that a subpoena was not outstanding, the record shows that petitioner consented to the removal of the books and records from his office.

Petitioner concedes that he consented to allow members of the Attorney General's staff to search and examine all records at his office on October 2, 1962 (Pet. 7, 8, and 11).

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[10] Petitioner is in error when he states (Pet. 9) that the Attorney General has admitted that there was no subpoena outstanding at the time the records were taken on October 2. The full context of the statement of the Attorney General at the trial, to which petitioner refers (*id.*) makes it clear that the trial prosecutor stated that *to the best of his recollection* there was no subpoena outstanding at that time. (See R. 507.)

However, he now—for the first time—blandly disputes the allegations in Assistant Attorney General Cohen's affidavit to the effect that petitioner told him on September 11, 1962 that representatives of the Attorney General could take whatever records they felt were pertinent to the investigation.

Even without considering this tardy refutation, and viewing only Schwartz' well documented, indisputable pattern of cooperation before and after the October 2nd visit, it is clear that he had consented to the removal of the records. Petitioner voluntarily and upon request furnished documents and information regarding his syndication activities before October 2nd.[11] Likewise, after said date, additional information and documents requested were supplied without protest. (*Id., e.g.,* Exh. 40). The visit on October 2nd was made with petitioner's express consent and after the Attorney General had received a letter of authorization prepared by his attorney (*Id.* Exh. 16). Significantly, on October 3rd, the day following the allegedly objectionable seizure, Schwartz readily consented to an examination of various records kept at his office (*Id.* p. 9). After receiving another letter of authorization prepared by his attorney (*Id.* Exh. 38), an examination taking several days was made. Notably, excerpts from the records were taken without objection (*Id.* p. 9).

All these events conclusively establish a pattern of continuing cooperation throughout the entire investigation and belie petitioner's belated denial that he consented to the removal of the records. It is significant that at no time prior to his arrest did he object to their removal or request their return.

This case is even stronger than *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds 330 U. S. 800 (1947), where this Court upheld the admission into evi-

[11] See Exhibits 9, 10 and 11 annexed to Cohen affidavit of August 8, 1963.

dence of a check seized by the government, without the defendant's explicit consent, during an examination of his books and records to which he had agreed. In the affidavits submitted by petitioner in support of the pre-trial motions, he admits that he turned over the records in response to outstanding subpoenas. Even assuming a subpoena was not outstanding on October 2nd, the records were unquestionably subject to subpoena and the Attorney General could have compelled their production at his offices at any time.

To soften its impact, petitioner attempts to distinguish the *Zap* case by emphasizing inconsequential facts (Pet. 11 and 12). He urges, for example, without reference to the record, that the State could not make a "meaningful analysis" before seizing the records (Pet. 11). However, the fact that the State representatives spent a full day at petitioner's offices and took only selected records wholly refutes this assertion.

The record clearly shows that the Attorney General had subpoenaed these records and was entitled to examine them at his office. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926), app. dismissed 276 U. S. 592 (1928). Furthermore, petitioner had expressly consented to the search and ". . . the taking of the papers which the United States had the right to inspect to the government offices cannot be viewed as an unreasonable seizure within the meaning of the Fourth Amendment." *United States* v. *Sherry*, 294 F. 684, 686 (M. D. Ill., 1923).

Petitioner, having consented to the search and examination, was not prejudiced by the fact that the examination took place in the state's offices rather than his own. Certainly, ". . . The agreement to allow an inspection carried consequences at least so great." *Zap* v. *United States*, *supra*, at 629.[12]

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[12] Petitioner mistakenly assumes the introduction in evidence of the books and records removed on October 2 was necessary to his

(Footnote continued on following page)

C. The records taken were held by petitioner in a representative capacity and are deemed to be public or quasi-public records and, therefore, not subject to the personal privilege against unreasonable searches and seizures.

The issuance and sale of real estate syndication securities is regulated under both federal law (Securities Acts of 1933 and 1934) and New York State law (Articles 23-A of the General Business Law of the State of New York, § 352 *et seq.*). It cannot be questioned that by virtue of the broad investigative and administrative powers conferred under these statutes,[13] the books and records of a firm which registered a securities offering pursuant to those statutes are of a public or quasi-public nature and therefore non-privileged. *Cf. Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186 (1945); *Troy Laundry Co.* v. *Wirtz,* 155 F. 2d 53 (9th Cir. 1946), *cert. denied* 329 U. S. 723 (1946); *Dunham* v. *Ottinger, supra; Davis* v. *Securities and Exchange Commission,* 109 F. 2d 6 (7th Cir. 1940), *cert. denied* 309 U. S. 687 (1940).

In *Shapiro* v. *United States,* 335 U. S. 1 (1948), this Court said:

> ". . . Accordingly, the principle enunciated in the Wilson Case, and reaffirmed as recently as the Davis Case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of

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(Footnote continued from preceding page)

conviction (Pet. 4, 5 and 6). However, the oversale of the $85,000 in subordinated units was established entirely by independent evidence and would be sufficient to uphold his conviction. See p. 19 of Respondent's Brief submitted to the Appellate Division, First Department.

[13] See Appendix A, *infra,* p. 15, General Business Law, §§ 352 (1), (2), and § 352-e (8).

> restrictions validly established'. (citations omitted)" (pp. 32 and 33)

In *Bowles* v. *Misle,* 64 F. Supp. 835 (D. Nebraska 1946), cited with approval in *Shapiro, supra,* at 23, the Court declared:

> ". . . the immunities of the Fourth and Fifth Amendments are not absolute but rather subject to waiver and that he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to such visitorial examination as the law contemplates, and, in that measure waives his constitutional immunities of privacy in respect to his papers and against compulsory testimony." (p. 843)

See also: *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Wilson* v. *United States,* 221 U. S. 361 (1910); *Davis* v. *United States,* 328 U. S. 582 (1946); *United States* v. *Mulligan,* 268 F. 893 (N. D., N. Y. 1920). The records here involved are required by law to be kept for inspection and examination by the State (see *supra,* p. 11) and are therefore non-privileged. *Cf. Dunham* v. *Ottinger, supra.*

Petitioner's suggestion that the books and records removed from his office were improperly taken because they were not instrumentalities of a crime[14] is not relevant in this case, where the petitioner had consented to an examination of the records and the records were removed pursuant to an administrative proceeding in a regulated industry. *Cf. Zap* v. *United States, supra; Oklahoma Press Publishing Co.* v. *Walling, supra; United States* v. *Morton Salt Co.,* 338 U. S. 632 (1950). In such cases the disclosure sought will be allowed if reasonable, i.e.,

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[14] For cases holding books and records as instrumentalities of a crime, see *Marron* v. *United States,* 275 U. S. 192 (1927); *United States* v. *Stern,* 225 F. Supp. 187 (S. D. N. Y. 1964).

if the investigation is authorized by statute and the documents sought are relevant to the inquiry (*Ibid.*). Undoubtedly, this test is met here.

In addition, the books and records taken were held by petitioner in a representative rather than in a personal capacity and, therefore, were not subject to the personal privileges against self-incrimination or unreasonable search and seizure. *United States* v. *Silverstein,* 314 F. 2d 789 (2d Cir. 1963), *cert. denied,* 374 U. S. 807 (1963); *cf. McPhaul* v. *United States,* 364 U. S. 372 (1960), rehearing denied 364 U. S. 925 (1960); *Rogers* v. *United States,* 340 U. S. 367 (1951); *United States* v. *White,* 322 U. S. 694 (1944). Petitioner himself stated in the prospectus (People's Ex. 1, R. 31) at page 14: "a limited partner has the right to inspect the partnership books, to have on demand information regarding partnership affairs and to obtain an accounting wherever circumstances render it just and reasonable."[15]

Petitioner attempts to becloud the issue in arguing that two of his purported "personal books" were allegedly illegally seized (Pet. 4). Not only were these books delivered with the other partnership records in response to the subpoena aforementioned but further they contain numerous partnership transactions.[16] Laura Satz, petitioner's bookkeeper and office manager, acknowledged this when she testified that People's Exhibit 51 ("Sidney Schwartz Spe-

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[15] New York Partnership Law, Article 8, § 99 provides: "(1) A limited partner shall have the same rights as a general partner to (a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them. (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable . . ."

[16] People's Exh. 51 contains receipts of monies from Beaux Arts investors from August 12, 1960 to June 4, 1961; People's Exh. 52 records payment of distributions to various Beaux Arts investors as well as payment of partnership's organization and office expenses (see C. D. 32, 55 and 61).

cial Royal State Bank", R. 456) ". . . is mainly holding the receipts of the different syndications" (R. 455) and People's Exhibit 52 ("Sidney Schwartz Regular Trade Bank", R. 458) ". . . was for the organization, office payroll, office expenses" (R. 457).

The fact that the petitioner failed to contest the subpoena either before or after delivery of these books and never claimed they were personal books until the aforesaid motion to inspect and the motion to suppress is strong evidence they are the partnership's books. *United States* v. *Hopps,* 215 F. Supp. 734, 755 (D. Maryland 1962), aff'd 331 F. 2d 332, *cert. denied* 379 U. S. 820 (1964). Obviously, the character of the books will not be changed because they reveal improper conduct or contain some unrelated transactions. *Cf. Wilson* v. *United States, supra,* p. 378.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, December 23, 1965.

Respectfully submitted,

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APPENDIX A

Article 23-A of the General Business Law of the State of New York.

§ 352. Investigation by attorney-general. 1. Whenever it shall appear to the attorney-general, either upon complaint or otherwise, that in the advertisement, purchase or sale within this state of any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title all of which are hereinafter called commodities, or that in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement or distribution within or from this state, of any stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein, sold or transfered in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls or options therefor hereinafter called security or securities, any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or that any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have made, makes or attempts to make within or from this state fictitious or pretended purchases or sales of securities or commodities or that any person, partnership, corporation, company, trust or association, or agent or employee thereof shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase, exchange or sale of securities or commodities

which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser, or that any broker, dealer, or salesman, as defined by section three hundred fifty-nine-e of this article, or any agent or employee thereof, has sold or offered for sale or is attempting to sell or is offering for sale any security or securities in violation of the provisions of said section or section three hundred fifty-nine-ee, any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions and courses of business are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices or he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person, partnership, corporation, company, trust or association, or any agent or employee thereof, to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate, and for that purpose may prescribe forms upon which such statements shall be made. The attorney-general may also require such other data and information as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

2. The attorney-general, his deputy or other officer designated by him is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or a magistrate, a court of record or a judge or justice thereof and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and examination shall not abate or terminate

by reason of any action or proceeding brought by the attorney-general under this article.

3. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee and/or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. The provisions for payment of witness fee and/or mileage do not apply to any officer, director or person in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.

4. If a person subpoenaed to attend such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered so to do by the officer conducting such inquiry, or if a person, partnership, corporation, company, trust or association fails to perform any act required hereunder to be performed, he shall be guilty of a misdemeanor.

§ 352-e. Real estate syndication offerings. 1. (a) It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, except companies organized under and pursuant to the provisions of articles nine or twelve of the public housing law or chapter eight hundred forty-five of the laws of nineteen hundred forty-two, to make or take

part in a public offering or sale in or from the state of New York or securities constituted of participation interests or investments in real estate, mortgages or leases, including stocks, bonds, debentures, evidences of interest or indebtedness, limited partnership interests or other security or securities as defined in section three hundred fifty-two of this article, when such securities consist primarily of participation interests or investments in one or more real estate ventures, including cooperative interests in realty, unless and until there shall have been filed with the department of law, prior to such offering, a written statement or statements, to be known as an "offering statement" or "prospectus" concerning the contemplated offering which shall contain the information and representations required by paragraph (b) of this subdivision unless the security offering is exempted hereunder or under section three hundred fifty-nine-f, subdivision two, of this article by rule or action of the attorney-general. The term "real estate" as used in the paragraph shall not include mineral, oil or timber leases or properties, or buildings, structures, land or other realty housing or containing business offices or industry, owned or leased by the issuer, where the issuer is not primarily engaged in the business of buying and selling such building or other realty or leases or interests therein. The circulation or dissemination of a non-firm offer (including circulation or dissemination of a preliminary prospectus pursuant to section ten (b) of the securities act of nineteen hundred thirty-three, and the rules thereto appertaining) shall not constitute the making of taking part in a public offering within the meaning of this section.

§ 352-e(8). Within four months after the end of its fiscal year, every syndicate which shall have been required to file an offering statement or statements or prospectus

under subdivision one of this section shall file with the department of law at its office in the city of New York an annual report of the syndicate operation, including an annual balance sheet and profit and loss statement certified by an independent certified public accountant. The department of law shall collect a fee of five dollars for the filing of each such annual report.

APPENDIX B

Opinion of Justice Gellinoff, dated October 21, 1963.

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 30

Index No. 2531/63

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY SCHWARTZ,

Defendant.

GELLINOFF, J.:

Defendant moves for an inspection of the Grand Jury minutes and for a dismissal of the indictment. Insofar as the motion urges that the indictment is based on insufficient legal evidence, it is denied (see People v. Howell, 3 N Y 2d 672). In the respect that the motion is based on the claim that defendant's constitutional rights were violated in that he was compelled to testify and furnish evidence against himself, it is likewise denied. The facts of this case, and the circumstances under which defendant testified before the Attorney General, do not bring him within the *ratio decidendi* of the cases relied on by him (e.g., People ex rel. Kenny v. Adams, 292 N. Y. 65; People v. Steuding, 6 N Y 2d 214; People v. Laino, 10 N Y 2d 161). The defendant did not testify before the Grand Jury, his testimony before the Attorney General was not submitted to the Grand Jury and, to the extent that books and records delivered by him to the Attorney General under compulsion of a subpoena were later used as evidence before the Grand Jury, defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law.

Dated: October 21, 1963

J. S. C.

APPENDIX C

Opinion of Justice Sarafite, dated February 27, 1964.

SUPREME COURT,

NEW YORK COUNTY,

SPECIAL AND TRIAL TERM, PART XXX.

INDICTMENT No. 2531—63

THE PEOPLE OF THE STATE OF NEW YORK

against

SIDNEY SCHWARTZ,

Defendant.

SARAFITE, J.

This is a motion to suppress evidence obtained by the Attorney General.

Defendant has been indicted on five counts of obtaining the signatures of persons to written instruments with the intent to cheat or defraud, and three counts of related crimes.

All of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General. The defendant, represented by counsel, neither tested the validity of the subpoena by motion to quash nor, after responding to it, did he refuse to answer questions or produce evidence. Neither did he assert any privilege to withhold any answer given or evidence produced (See General Business Law, § 359, and Penal Law, § 2447).

It is difficult to comprehend how it could ever be argued that such evidence was obtained as a result of unlawful search and seizure.

Moreover, the issue raised here was passed upon in another form in a motion by the defendant to inspect the Grand Jury minutes and to dismiss the indictment "upon the ground that the evidence here presented was in violation of the defendant's constitutional rights in that defendant was compelled to testify and furnish evidence against himself" pursuant to subpoena, and that the indictment was allegedly based on insufficient legal evidence.

That motion was denied in all respects by the court, (Gellinoff, J., N.Y.L.J., October 24, 1963, p. 14, c. 5) holding that "defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law."

Defendant, on the same papers, now moves to suppress this same evidence.

The motion is denied.

Submit order.

Dated: February 27, 1964.

JOSEPH A. SARAFITE,
J. S. C.